COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss. SUPERIOR COURT
CR 05-109

COMMONWEALTH

v.

CHRISTOPHER M. MCCOWEN

ORDER REGARDING DEFENDANT'S MOTION FOR A NEW TRIAL PURSUANT TO RULE 30(b) OF THE RULES OF CRIMINAL PROCEDURE

The above cited motion (pleading no. 242) was filed without a supporting affidavit. The motion is fact intensive, raising issues as to when defense counsel acquired certain information now alleged to be exculpatory. Rule 30(c)(2) requires an affidavit (or affidavits) in such instances. An appropriate affidavit is necessary for the court to consider whether the present motion should be deemed waived pursuant to Rule 30(c)(2) (the defendant's first motion for a new trial was filed 12/12/06 as pleading no. 211) and for the court to consider the merits of the present motion. The motion at hand is **DENIED** without prejudice to refiling with an appropriate affidavit or affidavits. If refiled, defendant's counsel is directed to provide appropriate transcript references, and references to exhibits filed in support of the motion, in the defendant's memorandum.

Gary A. Nickerson
Justice of the Superior Court

DATED: April 4, 2008

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CR 05-109

COMMONWEALTH

vs.

CHRISTOPHER M. McCOWEN

FINDINGS OF FACT, RULINGS OF LAW AND ORDER REGARDING DEFENDANT'S MOTION FOR POST-VERDICT INQUIRY OF JURORS PURSUANT TO COMMONWEALTH V. FIDLER

The Defendant, Christopher M. McCowen, was put to trial starting October 16, 2006, on indictments charging first degree murder, aggravated rape and armed burglary. On November 16, 2006, the jury returned guilty verdicts on all indictments, including first degree murder by extreme atrocity and felony murder. The above-captioned motion, in substance a motion for a new trial, was filed December 12, 2006. This court conducted a hearing on the motion on January 10th, 11th, 18th and February 1st, 2008. Based on all the credible evidence this court enters the following findings of fact.

PRIOR PROCEEDINGS

On January 6, 2002, the body of Christa Worthington was found in her North Truro home. Her death was a homicide. The investigation produced suspects but no arrest until DNA evidence was developed in the spring of 2005 linking the Defendant McCowen to Worthington. Mr. McCowen was indicted for the crime on June 14, 2005. Mr. McCowen's jury trial spanned

twenty-four court days, five weeks on the calendar.[1]

Upon receipt of the motion for a new trial, the court directed the Commonwealth to file its opposition pursuant to Rule 61A (C) of the Superior Court Rules. On June 8, 2007, this jurist entered an Order granting a hearing on certain aspects of the motion for a new trial and denying a hearing as to other aspects of the motion.[2] A hearing was granted as to two issues: first, whether racial bias affected the verdict and second, whether the alternate juror participated in the deliberation process. The June 8th Order called for protocol conferences between the court and counsel to determine the method and scope of inquiry. Counsel met with the court on four occasions: July 19th, August 3rd, September 7th, and December 20th.[3] Counsel conferred with the court by telephone conference on October 31st and November 27th.[4]

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[1]The tally includes 2.5 days to impanel, 11.5 days of testimony, a day all tolled consumed by the openings and the closings of counsel, one down day due to the illness of a juror and 8 days of deliberations.

[2]Those concerned with the delay from December 12th to June 8th, should look to footnote 1 of the Order of June 8th. Said footnote bears repeating: "Some have suggested that these issues demand immediate attention. Surely the Court recognizes its duty to respond to claims of juror bias in a timely manner; nonetheless, the law governing these issues is complex and requires thoughtful reflection. Motions of this type are first addressed by the trial judge, not by an appellate court. A hasty resolution of such a motion runs the risk of influence, at least on a subconscious level, from the human reaction on the part of a trial judge to preserve the efforts of all involved in a lengthy, hard-fought trial. It is appropriate to allow sufficient time, between the trial and a post-verdict inquiry of jurors, for dispassionate consideration."

[3]The court was prepared to conduct a hearing on the motion during the July session but the defendant encountered problems in securing the attendance of Juror Bohanna, hence the delay in going forward.

[4]The protocol conferences were recorded by the court stenographer. While initially impounded to ensure that the jurors were not exposed to the specifics of the hearing process before being questioned on January 10th and 11th, impoundment of the transcripts of the protocol conferences is no longer necessary. The two telephone conferences were not recorded. The telephone conference of October 31st dealt with the need to issue an order to compel the

At the hearing on January 10th and 11th, the court posed questions to the jurors individually, out of the presence of the remaining jurors, based on the requests of counsel. After the initial inquiry of each juror counsel had the opportunity to suggest follow-up questions and to state pertinent objections. The hearing on January 18th focused on the testimony of Dr. Samuel Sommers, a professor of social psychology at Tufts University. Dr. Sommers was called to the stand and examined by defense counsel and thereafter cross examined by the District Attorney. A collateral witness, Delainda Miranda, the great-aunt of Juror Gomes, was called by the defendant and examined by counsel in turn on February 1st. Counsel were granted thirty days to brief the issues.

FINDINGS OF FACT

At the time of the new year 2002, Christa Worthington was an attractive, well-educated, single middle-aged white woman living with her two year old daughter in an isolated home in North Truro, Massachusetts. Christopher McCowen was a handsome, powerfully-built large black man of limited intelligence who worked as a trash collector, stopping weekly for pickup at the Worthington home. On January 6th, Ms. Worthington's mostly naked body was found on her kitchen floor, legs splayed in a pose suggesting rape. Mr. McCowen's DNA was recovered from vaginal swabbings of the victim's body.

Mr. McCowen's defense attorney, Robert George, set out at trial to challenge societal stereotypes called up by the prior paragraph. In his opening statement, during the examination of

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attendance of Juror Bohanna and resulted in the Order To Secure The Attendance Of A Juror, issued November 1, 2007. The telephone conference of November 27th concerned Juror Bohanna's new-found desire to cooperate with the hearing process and the measures for summonsing the remaining jurors.

witnesses and in his closing argument, Attorney George sounded the theme that jurors should set aside hasty conclusions and consider the probability that Ms. Worthington and Mr. McCowen had a consensual sexual relationship and that someone other than Mr. McCowen killed her (e.g. TTR 578, 1845, 3530). [5] In pressing his point, Attorney George referred on occasion to Mr. McCowen as a black man. His reference to Mr. McCowen's race was altogether appropriate in the context of his defense.

Within days of the verdict, three jurors approached Attorney George, each stating a concern that race and other matters were inappropriately mentioned in the jury room. Attorney George spoke with the three jurors, reduced their concerns to affidavit form and secured their signatures on the affidavits (Ex.1, 2, 3).[6] The three complaining affiants were Juror Bohanna, a thirty-one year old black woman; Juror Audet, a sixty-three year old white man; and Juror Huffman, a twenty-two year old white woman. Juror Bohanna was in contact with Juror Huffman after the verdict but before speaking with Attorney George (MTR 1-40). Juror Bohanna also spoke with Juror Audet after the verdict but it is unclear as to whether they spoke before signing their affidavits (MTR 1-40).

Juror Bohanna's affidavit focused on two incidents involving race. She said that Juror

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[5]The trial transcript will be cited as TTR (page #). The transcript of the hearing on the motion for a new trial is in four volumes; the first two volumes' pages are numbered sequentially but the 3rd and 4th volume each start with page 1. They will be cited as MTR 1 (page #), MTR 2 (page #) and so on. The transcript of the four protocol conferences is also in four volumes and will be cited as CTR 1 (page #), CTR 2 (page #) and so on. The notation Ex. (#) designates an exhibit entered during the motion hearing. No trial exhibits are cited herein.

[6]The original affidavits were filed under seal however Attorney George attached redacted copies of the affidavits, identifying the affiants as Jurors A, B and C, to his motion for a new trial. The motion and redacted affidavits were not delivered to the Clerk's Office under seal and, before they were brought to the attention of this jurist, they promptly appeared in media reports.

Cahill expressed a fear of the defendant "because he was 'big' and 'black'" and that McCowen was staring at Cahill and "trying to 'intimidate' her." (Ex.1, parg.8, 9). Juror Bohanna also reported that Juror George, "while trying to convince the group that the victim had been bruised during a struggle, exploded when I questioned her about it by yelling that '...when a big black guy beats up on a small woman' bruises of that size would happen." (Ex.1, parg. 12-16). Juror Bohanna's affidavit describes how she confronted Jurors George and Cahill, accusing them of racism.

Juror Audet's affidavit in general tracks Juror Bohanna's affidavit. Juror Audet reports that Juror Cahill stated during deliberations, "that 'the big black guy' was staring at 'us' and that she was afraid of him." (Ex. 2, parg. 7). Reference is also made to Juror George losing "her temper when questioned about the bruising of the victim by yelling '...when a 200 pound black guy beats on a small woman he will leave these kind of bruises'." (Ex. 2, parg. 8).

Juror Huffman's affidavit reflects both the Juror Cahill and the Juror George incidents but also details a third incident involving Juror Gomes. Juror Huffman's affidavit states that Juror Cahill said "she was afraid because he was a 'big black guy', that he was 'looking at her'." (Ex. 3, parg. 6). Juror George was reportedly heard to have said that "'...when a 200 pound black guy throws around a small woman' that she would be injured with the bruises that were on her body". (Ex. 3, parg.8). Juror Huffman's affidavit further relates that in the wake of Juror Bohanna's confrontation with Jurors Cahill and George, Juror Gomes "who was black, told me his brothers' wives were white, that he has always been around white people and that he did not like blacks because 'look at what they are capable of'." (Ex. 3, parg. 11).

The three affidavits formed the template for the court's examination of the jurors. The

jurors were questioned individually, out of the presence of each other, in open court. Ten of the twelve jurors who went to verdict were questioned. The remaining two were excused, without objection by counsel, due to health and travel concerns. Juror Huffman was also questioned inasmuch as she was part of the deliberating jury until the morning of November 14th when she was removed for misconduct. The alternate, Juror Lyon, was questioned solely as to whether he participated in the deliberations in any fashion. Each juror was asked about the incidents outlined in the affidavits, the so-called Cahill, George and Gomes incidents. Additional questions were asked to ferret out any other incidents involving race during their jury service.

The court approached the questioning of the jurors as a two-tier process. The first round of questions was undertaken to determine who said what about race during the jurors' service. The jurors were cautioned not to reveal their thoughts or conclusions about the incidents but to state in straightforward terms either the exact words or the substance of what was said as to race. The court sought, and jurors provided, the factual context within which each incident arose. At the close of the first round of questions the court solicited the advice of counsel as to whether a second round of questions, focusing on the effect the various incidents had on the verdict, was warranted. Both sides declined to proceed to a second round. As a matter of discretion, the court did not proceed to further question the jurors.

The jurors, with one notable exception, did their best to recall the incidents that arose during their jury service. Surely there were some variances between the testimony of Jurors Bohanna and Audet and their affidavits. Likewise there were some variances amongst the testimony of each juror compared to the testimony of his or her fellow jurors. After thirty-four years of service in various capacities in the courts of this Commonwealth this jurist expects and

accepts such variances as the lot of humanity, as the essence of human frailty. Despite the variances, a clear picture of the three principal incidents emerged from the testimony. It remains for this jurist to reconcile the variances and set forth the facts found. Before doing so, let us turn to the one notable exception.

The court does not credit the critical elements of the testimony or the affidavit of Juror Huffman. Juror Huffman was discharged from the deliberating jury when she was found to have lied to police, and thereby to have misled the court, as to the true nature of her relationship with a man who was arrested in her home during a weekend break in the deliberations (TTR 3798-3802). The gentleman who was arrested was her live-in boyfriend. The court also found that Juror Huffman directly disobeyed the court's instructions to ignore media reports about the case (TTR 3801). Her discharge from the jury cast her in a bad light in her community. She has a motive to wreak havoc on the judicial process at hand.

There are two critical aspects to Juror Huffman's testimony, that is there are two instances when Juror Huffman's version of events is not corroborated by her fellow jurors. First, she claims Juror Gomes confessed to her alone his dislike of blacks (MTR 1-73) and second, she claims Juror George, at the hotel during the first evening of sequestration, turned a charades-type game into an inappropriate vehicle to mock Juror Bohanna's concern that Juror George was racially biased (MTR 1-89). The disinterested jurors who witnessed the charades game refute Juror Huffman's allegations. (MTR 1-124; 1-138; 2-203; 2-215). Moreover, as will be explained in due course, there is no credible corroboration for her claim that Juror Gomes is biased. The court is aware of at least three occasions when Juror Huffman reported supposed

events to Juror Bohanna, thereby raising in Juror Bohanna mistrust of her fellow jurors.[7] In short, Juror Huffman was meddlesome, had a motive to lie and her motion hearing testimony was refuted by others. This jurist does not find her credible.

The Cahill Incident

On at least one occasion, Juror Cahill told her fellow jurors that she feared Mr. McCowen based on his staring at her as she sat in the jury box. The timing of Juror Cahill's statement is debatable as to whether it occurred during deliberations, during a break in the deliberations, or during a break in the trial testimony (MTR 1-101; 2-184; 1-118; 1-131). Nonetheless there is unanimity amongst the jurors that the words were spoken and the court so finds.[8]

The jurors' accounts of the incident vary as to whether Juror Cahill attributed her fear of Mr. McCowen to his race. Eight jurors denied that Juror Cahill linked fear with race when the question was asked head on (MTR 1-102; 1-118; 1-132; 1-145; 2-184; 2-199; 2-213; 2-222). Juror Bohanna's affidavit expressly links the two (Ex. 1 parag. 9), but in her testimony she did not make that connection (MTR 1-18 to 20). Juror Bohanna testified that Juror Cahill expressed her fear, but Juror Cahill's linking the fear to race is absent from that testimony.[9] [10] Thus Juror

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[7]Juror Huffman told Juror Bohanna that Juror Cahill feared Mr. McCowen because he was black (MTR 1-76 to 77), that Juror George was mocking Juror Bohanna during the charades game (MTR 1-30) and that Juror Gomes felt Juror Bohanna's challenge to Juror George was an inappropriate display of temper, a supposed shortcoming of blacks (MTR 1-21). There is an additional, but less clear, concern regarding Juror Huffman and Juror Bohanna's discussions regarding communications between the deliberating jurors and the alternate juror (MTR 1-81 to 82).

[8]Juror Patenaude expresses uncertainty in this regard consistent with his lack of certainty as to most of the events he was questioned about (MTR 1-145).

[9]Juror Bohanna was questioned first. As the questioning of the jurors progressed the court was able to refine the questions asked. Hence Juror Bohanna was never directly asked if

Bohanna joins the eight, for the court accepts her testimony over her affidavit. Frankly the affidavits of all three complaining jurors result from the filtering of their statements through defense counsel's draftsmanship.[11] The live witness/juror is the better source in this instance.

Juror Audet testified that Juror Cahill said, "Hey, that black man is looking at us, and I don't like it. He scares me." (MTR 1-56). This jurist does not doubt Juror Audet's sincerity in testifying, but his testimony was laced with self-expressed uncertainty (MTR 1-47; 1-50; 1-51; 1-54; 1-57; 1-60; 1-63). Juror Audet was trying his best to recall the events but admitted the faulty nature of his recollection. He had difficulty distinguishing between Jurors George and Cahill (MTR 1-56; 1-47). To some extent, that's understandable inasmuch as the women are close in age and similar in appearance. Both women were school teachers and both sat in the back row of the jury box. By one account, Juror George is said to have expressed her fear of Mr. McCowen based on his race (MTR 1-17).

Juror Audet's memory, and indeed the memory of all the jurors, may be clouded by two sources of information. First, many of the jurors formed friendships with fellow jurors that have continued beyond their juror service. For example, Juror Audet has been in contact with Juror Bohanna (MTR 1-40) while several other jurors have met on at least one occasion to share dinner

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race gave rise to Juror Cahill's fear. Nonetheless Juror Bohanna had ample opportunity to so state and was repeatedly implored to give the details as to who said what.

[10]There is some suggestion in the testimony that Juror Bohanna, not Juror Cahill, spoke the words linking Juror Cahill's fear to race (MTR 1-132) but the evidence is limited in this respect.

[11]By this observation the court does not intend to disparage the efforts of counsel, but rather to recognize the experience based reality that drafting affidavits from multiple sources tends to lead to homogenization.

at a restaurant. The court is not suggesting that such instances of contact led to a scripting of any juror's testimony but the innocent exchange of pertinent information is probable.[12]

The second source of information comes from the media's intense coverage of the case. During the trial the jurors were cautioned daily to ignore media reports but that restriction ended with the verdict. Attorney George chose to file the motion for a new trial, together with the redacted affidavits as a public document. The affidavits were immediately widely published, well before this jurist received them. Moreover, a few of the jurors, Juror Bohanna in particular, (MTR 1-41), granted interviews which led to further publication of various accounts of what transpired in the jury room. The jurors were no doubt exposed to the many and varied reports as to what their fellow jurors had to say.

Whatever the genesis, this jurist finds Juror Audet's memory of the Juror Cahill incident faulty. The memories of the nine other credible jurors are persuasive. This is not a determination reached by balancing one against nine or by balancing the three complaining affiants against eight. The determination is made on the quality of the evidence. The eight are not a unified block; their memories as to the details vary. The court has scrutinized their testimony carefully, in particular looking for any hesitancy on their part to address matters of race. While the three accused jurors (for lack of a better term) were defensive, as one would expect, the eight non-affiants were not reluctant, or hesitant, or in a state of total denial as to race

[12]This jurist is not so quick to minimize the exchange of information post trial between Jurors Bohanna and Huffman. The prospect of Juror Huffman infecting the recollection of Juror Bohanna is real and, as will be discussed hereafter, is found in Juror Bohanna's recollection of the Juror Gomes incident.

being discussed in the jury room.[13] Juror Bohanna by her testimony does not link Juror Cahill's fear to race. Juror Audet's demeanor on the stand, while sincere, was halting and hesitant in recollection. The court finds that Juror Cahill indeed expressed her fear of Mr. McCowen but race was not part of the fear.

The George Incident

There was a large sketch pad set on an easel in the jury room. At times during the deliberations a juror would stand at the easel, sometimes with pointer in hand, to expound on his or her understanding of events at the crime scene. The pad served as a bulletin board for exhibits such as crime scene photos and as a chalkboard for outlining the points of discussion.

On one occasion Juror George was at the easel explaining her view of the evidence. As best as can be determined, this occurred on November 13th, the day that ended with the jurors being sequestered. Jurors were challenging her conclusions, probing her reasons. The tenor of the discussion was heated (MTR 1-10) . In her defense, Juror George blurted out that the victim's injuries were the result of a beating administered by a big black man (MTR 1-10) . Her precise words are difficult to determine. The majority of the jurors report hearing something to the effect that when a big black man (or a 200 pound black man) beats on a small woman, serious bruising will occur (MTR 1-10; 1-47 to 48; 1-96; 1-116; 1-142; 2-192). Fewer jurors report hearing something to the effect that a big black man (or a 200 pound black man) appeared at the victim's kitchen door in the early morning hours seeking to engage in sexual relations (MTR 1-

[13]Juror O'Connell's testimony was peppered by her hesitancy to speak directly about skin color, a hesitancy reflecting perhaps a desire to be socially correct or perhaps her own naivety about such matters. Nonetheless, Juror O'Connell was not hesitant in reporting what was said in the jury room.

135; 2-181; 2-209; 2-220).

Precision aside, the words provoked an immediate reaction from Juror Bohanna. All agree she rose to challenge Juror George, asking her what being black had to do with it (MTR 1-10). The two yelled back and forth (MTR 2-210). Juror Bohanna called Juror George a racist (MTR 1-117). Juror George denied she was racist, further stating that Mr. McCowen was indeed a big black man and that her words were an accurate description (MTR 1-136 to 137). The two swore at each other. Juror Bohanna approached the easel while Juror George returned to her seat (MTR 1-52). One juror seated between the two put a leg up to separate them (MTR 2-194), although this gesture was unnecessary as the two remained apart. The disagreement was verbal, not physical.[14]

The confrontation ended with Juror George saying she meant no harm (MTR 2-194).[15] The foreman called for a break in the deliberations. Some went outside to smoke, some remained in the jury hallway. Jurors George and Bohanna apparently engaged in civil conversation with each other during the break (MTR 1-17). When the deliberations resumed, Juror Bohanna was subdued in her participation that afternoon (MTR 1-55). The next day she was a more vocal participant (MTR 1-55), apparently in keeping with her role in the deliberations prior to the incident at the easel.

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[14]The affidavits of Jurors Bohanna and Huffman overstate the situation that Jurors Bohanna and George "had to be separated" (Ex. 1, parg. 16; 3, parg. 10). Likewise, media accounts that a court officer was called into the jury room to restore order were false. The court officer was called to facilitate a smoking break.

[15]Juror George denied she apologized (MTR 1-136 to 137). The foreman says Juror George said she was sorry (MTR 1-145). Nonetheless, the credible evidence is that she denied a racist intent.

Absolute certainty as to the words spoken by Juror George is desirable but unattainable given the absence of a verbatim recording of the deliberations. There is a range of recollections as to the words spoken. For example: Juror Audet's recollection of the words presents a mixed message: "Well, hey, he's 200 pound black guy; and you can see the bruises that he could cause because ... only a black guy can cause those kind of bruises." (MTR 1-47 to 48). The first half of Juror Audet's testimony conveys a message of Juror George describing the evidence but the last clause conveys a racist message.

The remaining credible jurors recall Juror George's words in less offensive terms. Nonetheless, if the words spoken were that a big black man would leave such bruises the specter of racism remains, not in as stark terms as those cast by Juror Audet, but still present. One must resort to the context of the event to better understand what Juror George said.

Juror Bohanna recalls two versions of Juror George's statement, subtle but significant in their difference. On one hand Juror Bohanna remembers, "When a big black guy beats up on a small woman..." (MTR 1-10), but also recalls, "When this big black guy beats up on a small woman..." (MTR 1-17). When the court brought the distinction to her attention she adopted "this big black guy" (MTR 1-12). When asked if Juror George was referring to black men in general or to Mr. McCowen, Juror Bohanna said it was specific to Mr. McCowen (MTR 1-12). Juror Audet likewise said Juror George was referencing Mr. McCowen, not black men in general (MTR 1-48). When she was allowed to formulate her own recollection of the words, even Juror Huffman started with "this big black guy", only to catch herself and shift to "a big black guy"(MTR 1-69). Juror Ivers recalls Juror George's comments as focused on the size of Mr. McCowen, not his race (MTR 2-184).

The court is reluctant to accept Juror George's testimony on this point absent careful scrutiny. Her demeanor on the witness stand on January 10th was defensive, not surprising given the accusation that she was racist. Her demeanor during impanelment, a more relaxed but hardly casual atmosphere, was unremarkable. Juror George underwent a careful voir dire examination, including questions about racial bias, which led to her being found indifferent. (TTR 110-116). Both she and Juror Bohanna were the verbal combatants in this confrontation and their involvement in the fray is apt to cloud their recollection.[16] Juror George's reaction when confronted on November 13th, 2006, as reported by the remaining jurors, is more instructive than her own denial of racist intent on January 10th, 2008. When told she was a racist Juror George vehemently denied it. Juror O'Connell recalls Juror George saying to Juror Bohanna, "That's not what I was meaning and you know that"(MTR 2-194). Juror Patenaude reports that Juror George "apologized for using that term" (MTR 1-145).

Obviously Juror George's words offended Juror Bohanna. The court accepts Juror Bohanna's ire as a warning flag that careful scrutiny must be given to Juror George's words. Juror Bohanna was appropriately vigilant in keeping racial bias from infecting the deliberations. She testified that she expressly told her fellow jurors that she had a purpose to make sure that racism did not impair the verdict (MTR 1-24). Her calling was honorable and should not be

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[16]Juror Bohanna recalls both in her affidavit and in her testimony that in the immediate wake of her confrontation with Juror George over "this big black man", she accused Juror George of being afraid of Mr. McCowen because of his race. Whereupon Juror Cahill volunteered that it was she who was afraid of Mr. McCowen (MTR 1-14 to 20; Ex. 1 parg 14, 15). In her recollection Juror Bohanna fuses the Juror George incident to the Juror Cahill incident. The remaining credible jurors recall the two incidents as being wholly separate, even on different days (MTR 1-50; 2-199; 1-102; 1-119; 2-185; 2-213). The court attributes this discrepancy not to Juror Bohanna lying but simply to her being too close to the events to accurately recall all the details.

misconstrued to render her a vigilante, someone with a chip on her shoulder.[17] Juror Bohanna reacted forcefully and fairly to Juror George's words but that does not render Juror George a racist.

To determine the import of Juror George's words this jurist must evaluate all the credible evidence. In doing so, the court casts aside Juror Audet's recollection that "only a black guy can cause those kind of bruises" as there is no broad support for such an overtly prejudiced statement in the testimony of the remaining credible jurors.[18] Moreover, those words do not appear in Juror Audet's affidavit. Whether the reference was to "a big black man" or "this big black man", the reference was specifically to Mr. McCowen. The term "big black man" was used. The words provoked a sharp verbal confrontation between Jurors George and Bohanna. It was then and there contested as to whether the words evidenced racism. As reported by the remaining jurors, Juror George denied any racist intent and regretted her hasty use of the term. During the break the two jurors spoke civilly and all resumed their deliberations for three more days. It remains for this jurist to determine, later in this decision, the ultimate fact, whether "a black man" or "this black man" is a statement reflecting racial bias.

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[17]Juror Bohanna's unexplained reluctance to respond to defense counsel and the clerk's attempts to secure her attendance at the post trial hearing (CTR 2- 9 to 17; MTR 1-36) did not affect the court's determination of her credibility. If she were partial to the defendant's cause one would expect her to attend willingly. Her attorney paid her expenses for attending the hearing (MTR 1-37) but curiously, to date, no one has submitted a voucher for reimbursement.

[18]Similarly, there is a single reference in Juror Patenaude's testimony to Ms. Worthington as "a small white woman" in the phrase "big black man coming at a small white woman". (MTR 1-142). There is no broad support for the words, "small white woman" in the testimony of the remaining credible jurors; "small woman" certainly, but not "white". Given Juror Patenaude's inability to recall any of the events in the jury room with specificity one can cast aside his reference to the victim's race. This is not done lightly for the phrase "big black man coming at a small white woman" is laden with potential bias for the stereotype harbored therein.

The Gomes Incident

Juror Gomes is a man of color. Casting aside for the moment the futility and folly of pigeonholing individuals racially, by physical appearance one might say the gentleman is black. To this jurist, as a man who has lived his life entirely in Southeastern Massachusetts where Cape Verdeans are a major component of the minority community, Juror Gomes appears to be Cape Verdean. Without debate, the gentleman is, by appearance, a member of the minority community.

Juror Huffman alleges that during the smoking break that immediately followed the Juror George/Juror Bohanna confrontation she sat outside on a bench with Juror Gomes (MTR 1-72). Juror Gomes supposedly said to Juror Huffman that "his brothers' wives were white, that he has always been around white people and that he did not like blacks because 'look what they are capable of'." (MTR 1-73).[19] The latter was said to be a reference to Juror Bohanna's display of temper in confronting Juror George and not a reference to Mr. McCowen as the killer (MTR 1-73). None of the other jurors overheard this conversation.

There are reports however of other jurors hearing Juror Gomes mention race. Juror Audet says that during deliberations he heard Juror Gomes say, "Hey: I'm not like him - I was raised by white people", apparently in reference to Mr. McCowen (MTR 1-58). Assuming Juror Audet

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[19]In her affidavit Juror Huffman reported that Juror Gomes said "his brothers' wives were white" (Ex. 3, parg 11). In her testimony Juror Huffman reported that Juror Gomes said "that all of his brothers are married to white women" (MTR 1-73 to 74). Juror Gomes only has one brother (MTR 1-121). Juror Huffman's use of brothers, plural, is yet another example of her playing fast and loose with the truth.

took these words as some evidence of racial bias[20], it is curious that the incident was not reported in Juror Audet's affidavit. Again, none of the remaining jurors heard Juror Gomes speak the precise words now recollected by Juror Audet. Some jurors, including Juror Bohanna, did report that Juror Gomes said his family included blacks and whites (MTR 1-31 to 32; 2-201; 1-103 to 104; 1-133). Juror Ivers recalled Juror Gomes discussing race in the context of his own arrest based on a misidentification and his eventual exoneration in the courts (MTR 1-186).

Juror Bohanna failed to reference any statements of Juror Gomes in her affidavit. Yet in her testimony Juror Bohanna described an incident during a lunch break when she was walking ahead of Jurors Huffman and Gomes and Juror Gomes said he did not like blacks (MTR 1-20 to 22). Further questioning suggests, and this court finds, that Juror Bohanna did not hear this firsthand but rather heard it from Juror Huffman (MTR 1-21, 23).

Juror Gomes testified that he was not prejudiced against blacks. To quote him, "I don't feel that way"(MTR 1-121). In the wake of Juror Gomes' testimony on January 10th there appeared in court on January 11th, the second day of juror testimony, one Delainda Miranda.

Delainda Miranda is the 74 year old great-aunt of Juror Gomes, the sister of Juror Gomes' grandfather (MTR 4-6). She is a pleasant woman known to this jurist from her frequenting the local courts. She is in and out of the Barnstable Superior and District Courthouses often enough that she leaves baked goods for the security staff (MTR 4-36).

Peter Manso has been credited by Ms. Miranda and by Attorney George with bringing Ms. Miranda forward as a witness (MTR 4-38; 3-5). Mr. Manso is a well-published author who

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[20]The assumption is a fair one inasmuch as Juror Audet testified that "Gomes said it in a mean tone, too" (MTR 1-58).

lives in North Truro and has followed the McCowen case intensely. Very recently he has publicly declared his advocacy for Mr. McCowen, claiming to assist the defense team.[21] The very notion that Ms. Miranda would spontaneously reach out to Mr. Manso, as opposed to Attorney George, seems improbable and casts doubt on her credibility.

Ms. Miranda's testimony on February 1, 2008 as to why she came to speak out against her great nephew does not ring true. She said she was perturbed by Juror Gomes' lies as reported in the press accounts of the testimony of January 10th (MTR 4-14). When the prosecutor presented her with the press reports and asked her to point to the troubling passages she floundered badly (MTR 4-21 to 23). Indeed her entire testimony was weakened by her inability to recall events without having her affidavit in hand (MTR 4-9 to 11).[22]

In her testimony she described a chance meeting she had with Juror Gomes in a restaurant a few months after the verdict (MTR 4-15 to 16). If that meeting actually occurred and Ms. Miranda's description of other statements by Juror Gomes were true, then she would have reported it to the court or Attorney George well before January 11th. Curiously, the restaurant incident is not in Ms. Miranda's affidavit. Ms. Miranda was extensively interviewed by both Mr. Manso and Attorney George in order to prepare the affidavit. Both in her affidavit and at one point in her testimony Ms. Miranda suggested that she last spoke with Juror Gomes about race

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[21]By taking sides he has triggered debate in the media as to journalistic ethics; interesting but beyond and apart from the concerns at hand.

[22]Ms. Miranda's affidavit was filed January 18, 2008 together with the defendant's Motion to Supplement the hearing via her testimony. As with prior pleadings, the Miranda affidavit was issued to the media before it ever hit this jurist's desk. In the transcript of the lobby conference called to discuss the motion and the Miranda affidavit this jurist takes Attorney George to task for what by then was an established pattern of trying the case in the media (MTR 3-7 to 8).

when he was picked as a juror (Ex. parg. 8; MTR 4-8), an assertion inconsistent with the restaurant incident.

Ms. Miranda's credibility suffers in two other respects. She says that Juror Gomes has expressed his prejudice against blacks freely and often at family functions and in conversations in public places (Ex. parg. 13; MTR 4-11 to 12) Nonetheless, no other family member came forward to buttress her claims.[23] Only Juror Huffman corroborates Ms. Miranda and Juror Huffman's credibility is nil. Second, two of Ms. Miranda's three sons have been convicted in the Barnstable courts on numerous offenses leading to jail and state prison sentences (MTR 4-6). Ms. Miranda is a resilient person and, as noted above, pleasant in demeanor. When she was cross examined on the 11th by District Attorney O'Keefe, a long time career prosecutor in the Barnstable courts, there was a bit of a barb in her jest that he never said hello to her in her frequent trips through the courthouse (MTR 4-37). It's not a stretch to conclude Ms. Miranda harbors some resentment towards law enforcement.

In the final analysis, this jurist is faced with two polar opposite views of Juror Gomes. By his own account, he served as an impartial juror. According to Ms. Miranda, the man harbors a deep seated prejudice. The latter notion does not square with this jurist's observation of Juror Gomes over the course of the five week trial. During impanelment Juror Gomes was questioned on voir dire at length (TTR 329-337). His demeanor then led the court to say, in response to a request by the Commonwealth to challenge him for cause, that, "this gentleman is as straightforward as any." (TTR 336). The man was riveted to the testimony at all times, taking

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[23]This is true despite the fact that Ms. Miranda's anticipated testimony was trumpeted in the media for two weeks before her appearance on the witness stand on February 1st. She suggested her decision to testify was debated within her family (MTR 4-39).

notes occasionally. He listened carefully no matter which attorney had the floor. Nothing in his demeanor suggested a closed mind. Based on all the credible evidence this jurist finds that Juror Gomes did not express prejudice towards blacks but instead served as an impartial juror. Ms. Miranda has proved to be a storyteller, perhaps someone seeking her fifteen minutes of fame.

The Remaining Incidents

The three affidavits raised the prospect of the deliberating jurors discussing their progress with Juror Lyon, the alternate juror. The court's inquiry focused on whether Juror Lyon discussed his analysis of the evidence with the deliberating jurors, thereby infecting the verdict by outside influence. The jurors were unanimous that that did not occur.

The court asked the jurors a question prompted by the requests of Attorney George filed and discussed during the protocol conferences. The question was whether any juror expressed his or her feeling that black individuals were prone to aggression or violence. Both Attorney George and this jurist intended the question to ferret out any expression of what is recognized to be a stereotypical bias against black men (MTR 3-29). The answers were interesting and, as to Juror Audet, insightful.

Only two jurors responded affirmatively to the question. Six jurors denied hearing such a statement from their fellow jurors (MTR 1-122; 2-187; 1-80; 1-138; 2-202; 2-223). Three jurors were not directly asked the question.[24] Juror Bohanna replied affirmatively and fairly related the question to the comments attributed to Juror Gomes (MTR 1-20). Juror Audet said he heard such a statement but could not remember who said it (MTR 1-60). The question was not prompted by

[24]Admittedly this jurist was not perfectly diligent in asking the same questions of each juror. While all the jurors were questioned on the three major incidents, some left the stand without being asked about the lesser matters.

the three jurors' affidavits. The question was intended to be a sweep question, as a follow-up question asked to try to catch any comments about race otherwise missed. Juror Audet's answer was like his answers to other questions where often he stood somewhat apart from the remaining credible jurors.[25] The cumulative impression this jurist has of Juror Audet is that he genuinely tried in his testimony to be forthright and to be helpful in the quest for evidence of racial bias. His consistency in going just a little bit further than his fellow jurors in his answers raises a caution in the mind of this jurist to be sure, when considering Juror Audet's recollections, to seek corroboration from his fellow jurors. The court has surely considered the possibility that Juror Audet has it right and everyone else has it wrong but his demeanor and hesitancy on the witness stand conveyed the idea that he was grasping to recall the events. As previously noted, his testimony differs at times from his affidavit. This is not a matter of Juror Audet's testimony running counter to only the testimony of the accused and the neutral jurors for Juror Bohanna does not corroborate the critical elements of Juror Audet's testimony. It appears that with the passage of time Juror Audet's mind has enhanced his memory of those aspects of the deliberations touching upon race. The court finds this to be an instance of human frailty for in other respects Juror Audet appears sincere in his testimony.

Juror Bohanna expressed the concern that Juror George asked about her hairstyle and education in a manner suggesting racial bias (MTR 1-26). Juror Bohanna appeared through the trial with her hair done in the cornrow style of braiding. The cornrow pattern varied every few days but was always intricate, suggesting great effort on the part of Juror Bohanna's stylist. Juror

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[25]Reference is made to Juror Audet's recollection of Juror Cahill linking her fear to race, to his recollection of "only a black guy can cause those kind of bruises", and to "Hey, I'm not like him – I was raised by white people."

Bohanna suggests in her affidavit that Juror George asked about her hairstyle and education in a "snide" manner (Ex. parg. 17). Juror Bohanna's testimony places the remarks in a clearer context. Apparently the conversation took place in the deliberation room shortly after Juror Bohanna had spoken about her role as a black juror (MTR 1-26 to 27). Juror George asked her about her hairstyle. Juror Bohanna replied, in effect, that it was part of her cultural identity (MTR 1-27). At worst, the incident is equivocal. What one woman reports as small talk initiated by others (MTR 1-137), the other interpreted as snide.

The court asked the jurors whether anyone spoke up during deliberations as to the need to be sure their verdict was not tainted by racial bias. Juror Bohanna was careful to do so with some frequency (MTR 1-24; 1-123). The notion that "We've got to stick to the evidence" was a theme mentioned (MTR 1-149). The foreman reinforced that thought as did Juror Gomes (MTR 2-214; 1-123). In response to the court's question, Juror Maltby said, "I do remember speaking about it saying, you know, 'We want to make sure we get this right, totally right; and race does not really come into it' – because it didn't." (MTR 2-214).

APPLICATION OF THE FACTS TO THE LAW

The Need for a Hearing

In response to the defendant's filing of his motion for a new trial, the Commonwealth urged the court to decide the matter on the papers. Some of the claims set forth in the motion and the three affidavits could be disposed of without a hearing. The Order Regarding Defendant's Motion For Post Verdict Inquiry Of Jurors, entered June 8, 2007, denied a hearing with respect to those issues.

The affidavits raised three superfluous issues. First, there was a suggestion that

individual jurors had voiced their reaction to the evidence prior to deliberations. Pre-deliberation comments by jurors to fellow jurors, other than comments reflecting an impermissible bias, do not warrant a post-verdict inquiry. Commonwealth v. Mahoney, 406 Mass. 843, 856 (1990). Second, Jurors Bohanna and Audet reported that the jurors discussed the evidence of Mr. McCowen's prior restraining orders in disregard of the court's limiting instruction on that evidence.[26] Post-trial reports that jurors disregarded a limiting instruction do not necessitate a hearing. Commonwealth v. Fidler, 377 Mass. 192, 198-199 (1979). Third, the affiants expressed their ignorance as to the effect of reporting a second deadlock after the Tuey-Rodrigues charge. Jurors Bohanna and Audet suggest they would have remained deadlocked if they knew such action would have led to a mistrial. The purported ignorance of certain jurors as to the consequences of reporting a second deadlock is outside the scope of Commonwealth v. Fidler and its progeny. The position of Jurors Bohanna and Audet is more akin to a matter of personal philosophy outside the scope of Commonwealth v. Fidler than to any type of extraneous influence or impermissible personal bias. See Commonwealth v. Luna, 418 Mass. 749, 754 (1994); Commonwealth v. Guisti, 434 Mass. 245, 253-254 (2001). It has long been the law in Massachusetts that a trial judge has no obligation to inform jurors that the second report of a deadlock can lead to a mistrial. Foote v. Foote, 95 Mass. 411, 412 (1866). The court did nothing to coerce a verdict. See Commonwealth v. O'Brien, 65 Mass. App. Ct. 291, 295 (2005). The oft-expressed second thoughts of a conscientious juror do not necessitate a new trial.

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[26]The prior restraining orders were known to the state police detectives and were one factor arousing their suspicions as to Mr. McCowen. In cross examining one detective, Attorney George ignored the restraining orders in his attempt to suggest there was nothing in Mr. McCowen's background of a suspicious nature (TTR 2018 to 2021). Testimony was allowed about the restraining orders on redirect subject to a limiting instruction (TTR 2082 to 2084).

Commonwealth v. Delp, 41 Mass. App. Ct. 435, 440, rev.dev. 423 Mass. 1112 (1996).

The core issues of racial bias and the role of the alternate juror could not be disposed of in summary fashion. A judge has broad discretion in determining whether a post-verdict inquiry of a juror is warranted and need not conduct such a hearing, unless the defendant makes a "colorable showing" that extraneous matter may have affected the jury's impartiality. Commonwealth v. Lynch, 439 Mass. 532, 545, cert. den. 540 U.S. 1059 (2003); Guisti, 434 Mass. at 251 (2001). In instances of alleged bias, a post-verdict hearing is required if the defendant raises a "reasonable claim" of juror bias. Guisti, 434 Mass. at 253-254 (citing Commonwealth v. Amirault, 399 Mass. 617, 625 (1987)). When a case is close a judge should exercise discretion in favor of conducting a judicial inquiry. Commonwealth v. Dixon, 395 Mass. 149, 153 (1985).

The gist of the Commonwealth's request for a decision sans hearing was that the suspect statements were not racially charged when placed in context. This jurist was unable to infer the context with any degree of confidence from the three affidavits. Moreover, bedrock principles of constitutional law necessitated a hearing. The United States Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Smith v. Phillips, 455 U.S. 209, 215 (1982). "In exercising discretion to ferret out possible juror bias, a judge must 'be zealous to protect the rights of an accused'." Commonwealth v. Clark, 446 Mass. 620, 630 (2006) (quoting Wainwright v. Witt, 469 U.S. 412, 430 (1985)).

The Mechanics and Scope of the Hearing

The scope and mechanics of a post-verdict inquiry of jurors is largely left to the sound

discretion of the trial judge. Amirault, 399 Mass. at 627; U.S. v. Boylan, 898 F. 2d 230, 258 (1st Cir. 1990), cert. den., 498 U.S. 849 (1990). "The freedom and independence of jury deliberations are best protected by court supervision and direction of post verdict interviews." Fidler, 377 Mass. at 203. Several of the reported cases on the subject arise from instances where the trial judge questioned the jurors individually and granted counsel the opportunity to suggest further questions or areas of inquiry. E.g. Commonwealth v. Kincaid, 444 Mass. 381, 383 (2005); Commonwealth v. Guisti, 449 Mass. 1018, 1018 (2007); Commonwealth v. Jacobson, 19 Mass. App. Ct. 666, 682 (1985); Boylan, 898 F. 2d at 259. One notable exception to that practice is found in the case of Benjamin Laguer wherein the trial judge permitted the attorneys to question the jurors. Commonwealth v. Laguer , 36 Mass. App. Ct. 310, 312 (1994). A different hearing format was used in the Amirault case. There the trial judge first questioned the juror and the defense counsel was allowed to cross examine the juror. Amirault, 399 Mass. at 621-622. Counsel should be present for any substantial post verdict questioning of a juror. Mahoney, 406 Mass. at 856.

The decision to proceed with the judge asking the questions was made after consultation with counsel. McCowen's trial and the hearing on the motion for a new trial drew nationwide media attention. The prospect of allowing the attorneys to question the jurors raised in this jurist's mind a concern for the overall health of our jury system. The jury system would suffer if the public saw the procedure as a "grilling" of the jurors. Care must be exercised lest a post verdict inquiry of a juror leads to placing the juror on trial. See Amirault, 399 Mass. at 627.

The court felt bound by precedent to conduct the inquiry in open court: "[O]nce a decision is made that an evidentiary hearing is to be held in the presence of the prosecutor and

defense counsel, the public is entitled to be present in the absence of a ruling, based on detailed findings of fact, that confidentiality is warranted in the public interest." Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 885 (1990). Neither the prosecutor nor defense counsel sought a closed hearing. The three affidavits were sufficient to warrant proceeding to an evidentiary hearing as opposed to taking the preliminary step of a closed investigation. Moreover, by filing the redacted affidavits, not under seal, defense counsel, perhaps prematurely, put the accusations of racial bias in the public domain. Only a full public hearing would have served justice.[27]

While the mechanics of the hearing were resolved with little debate, the scope of the questioning of the jurors presented a thornier matter. "Courts face a delicate and complex task whenever they undertake to investigate reports of juror misconduct or bias". U.S. v. Thomas, 116 F.3d 606, 618 (2nd Cir. 1997). Massachusetts case law has long recognized a sharp divide between asking a juror what was said in the jury room and asking a juror how that information affected his or her verdict. Fidler, 377 Mass. at 201. The recent case of Aaron Kincaid, albeit a case of extraneous influence on the jury, is instructive. Kincaid, 444 Mass. at 391-392. The Kincaid court cautioned trial judges not to stray into the deliberation process of the jury. Id. Also see Rule 606(b) of the Proposed Massachusetts Rules of Evidence. Rule 606 (b) of the Federal Rules of Evidence governs the receipt of evidence in instances of extraneous influence on a federal trial jury. Several federal courts have avoided the debate over the scope of such evidence by shifting the focus from bias in the deliberation room to the truthfulness of the

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[27]To those in the community who complain that the public spectacle of jurors being questioned about their deliberations can only harm the jury system, this jurist states his sincere hope that the hearing will remind future jurors that insensitive statements as well as bigotry have no place in the jury room. Justice will have been best served if that goal is met.

accused juror's response to questions about his or her impartiality during impanelment. e.g. Tobias v. Smith, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979); U.S. v. Henley, 238 F.3d 1111, 1121 (9th Cir. 2001).[28] Connecticut has recently reviewed the objective/subjective divide in the post verdict questioning of jurors and has decided to rigidly maintain the distinction. Connecticut v. Phillips, 927 A.2d 931, 937-938 (Conn. App. Ct. 2007). Fidler predicted there would be cases where it would be difficult to confine the post verdict inquiry of jurors to objective questions. Fidler, 377 Mass. at 198. In crafting the questions to be asked of the McCowen jurors, this jurist was mindful of an earlier court's cautionary language that in instances of racial bias it may be necessary to probe deeper into the effect of the words spoken. Commonwealth v. Tavares, 385 Mass. 140, 155 fn. 25 (1982). A claim of racial bias is indeed one of the difficult cases foreshadowed by Fidler. Tavares, 385 Mass. at 155.[29]

Taking both Kincaid and Tavares into account, the court fashioned a two stage hearing. During the first stage the jurors were questioned as to what was said in the jury room with regard to race. Who said what and the context of the statements were the focus of the first stage. The jurors were cautioned at the outset not to stray into conclusions or effect type answers. Each

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[28]Indeed, the defendant's memorandum on this motion asks the court to conclude Juror Gomes lied when he was asked questions about racial bias during impanelment. This claim amounts to naught given the courts' findings of fact.

[29]Tavares arose in the context of a claim of racial bias brought to the trial judge's attention while the jury was still deliberating. The trial judge inquired of each juror as to his or her ability to continue to deliberate impartially. A post verdict inquiry as to impartiality is hobbled by the natural inclination of most jurors to rally around their verdict and deny racial bias. In Laguer, the Supreme Judicial Court remanded the case for the objective post trial questioning of the jurors. Commonwealth v. Laguer, 410 Mass. 89, 98 (1991). The Laguer court shunned any subjective inquiry of the jurors apparently on the basis that the alleged racial epithets , if proved, reflected impermissible juror bias per se.

juror was reminded of this admonition as necessary in the course of his or her questioning.

At the conclusion of the first stage of questioning counsel were given the opportunity to proceed to stage two with questions designed to determine the effect of the information gathered in stage one. Both the prosecutor and, after some tap dancing, the defense attorney declined to proceed to stage two. The court declined to proceed to stage two as an exercise in discretion, not due to a notion that the case law forbids such an inquiry.

The court enlarged the scope of the hearing to permit the defendant to call two non-juror witnesses. Professor Sommers testified as an expert social psychologist on matters of racial bias. While a trial judge considering an issue of a post conviction claim of juror bias is not required to consider such expert evidence, Amirault, 399 Mass. at 628, this jurist found the Professor's testimony to be of assistance in sorting out the question of subconscious racial bias. Ms. Miranda was allowed to testify to Juror Gomes' feelings toward black individuals. The testimony was received as evidence not only tending to impeach Juror Gomes' testimony but also as evidence directly bearing on his impartiality. See Henley, 238 F.3d at 1121. Non juror witnesses have long been used for such a purpose. See Woodward v. Leavitt, 107 Mass. 453, 459 (1871).

The court has an obligation to provide a fair forum for the defendant to litigate his concerns as to racial bias. "[A]n allegation that a juror is racially biased strikes at the very heart of the defendant's right to a trial by an impartial jury...[P]ublic confidence in the fair administration of justice is undermined if such allegations are not thoroughly investigated. A trial court must be especially vigilant in investigating the specter of racial prejudice in the judicial process. The overarching principle in defining the scope of the inquiry is that the breadth

of the questioning should be sufficient to permit the entire picture to be explored". New Jersey v. Phillips, 731 A.2d 101, 108 (N.J. Super. Ct. App. Div. 1999). Counsel, and the pertinent case law, were consulted in crafting the hearing in this instance.[30] This jurist leaves it to the appellate courts to determine the sufficiency of the hearing afforded the defendant.

The Legal Standard

The overarching principle of law is clear. The Fifth and Sixth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights guarantee a defendant a fair and impartial jury, with jurors unaffected by racial bias. "Article 12 of the Massachusetts Declaration of Rights guarantees the right of a criminal defendant to a trial by an impartial jury. 'The presence of even one juror who is not impartial violates a defendant's right to trial by an impartial jury'." Clark, 446 Mass. at 629 (quoting from Commonwealth v. Vann Long, 419 Mass. 798, 802 (1995)). "The defendant was entitled to 'a jury capable and willing to decide the case solely on the evidence before it', and not on a juror's preconceived notions about racial attributes". Clark, 446 Mass. at 630 (quoting from Commonwealth v. Seabrooks, 433 Mass. 439, 446 (2001)). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen". Smith v. Phillips, 455 U.S. at 217.

Fidler and its progeny require a two phase analysis as to the burden and quantum of proof in cases of an external influence on the deliberations. Kincaid, 444 Mass. at 386-387. First the

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[30]The pains taken to determine the proper scope of the inquiry in the case at hand are in marked contrast to the broad inquiry of jurors on the motion for a new trial in Rex v. Richardson, case No. 59 in The Legal Papers of John Adams, 1770-1772.

defendant must prove, by a preponderance of the evidence, that the jurors were in fact exposed to the extraneous matter. Id. Assuming the defendant does so, the burden then shifts to the Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the extraneous matter. Id. The Commonwealth's burden must be met within the confines of the probable effect of the extraneous fact on a hypothetical average jury. Kincaid, 444 Mass. at 389. This abstraction serves the purpose of not invading the subjective thought processes of the jurors and recognizes the difficulty in doing so. See Kincaid, 444 Mass. at 391.

Cases of juror bias described early in the post-Fidler era recognized that juror bias was not an extraneous influence on the jury but nonetheless resorted to the Fidler protocol to permit the court to consider the issue. Commonwealth v. Grant, 391 Mass. 645, 653 (1984); Tavares, 385 Mass. at 155; Jacobson, 19 Mass. App. Ct. at 682-683. The cases just cited were resolved factually, that is the trial judge found no evidence of impermissible bias, without articulating a burden or quantum of proof.

The first clear statement in our case law as to the burden and quantum of proof in instances of juror bias appeared in the Amirault decision in 1987: "The defendant has the burden of showing that the juror was not impartial and must do so by a preponderance of the evidence". Amirault, 399 Mass. at 626. Amirault was followed in 1994 by Laguer. The Laguer court did not articulate the burden and quantum of proof as an abstract principle of law but instead instructed the trial court to determine, on remand, whether the racist words contained in the complaining juror's affidavit were truly uttered in the jury room. Commonwealth v. Laguer, 410 Mass. 89, 99 (1991). On remand the trial judge "proceeded on the basis that the defendant had the burden of demonstrating by a preponderance of the evidence that the jury were exposed to

ethnic or racial bias". Laguer, 36 Mass. App. Ct. at 314. Most recently the Kincaid court cited both Amirault and Laguer with approval to the effect that the defendant bears the burden of proof to a preponderance of the evidence in a hearing on a claim of juror bias. Kincaid, 444 Mass. at 387.

There remains a subtle but significant difference in the proof of bias under Amirault and the proof of bias under Laguer. Amirault presented a claim of juror bias that was wholly internal to the suspect juror. The juror, apparently herself a victim of a violent crime, never spoke of her experience to her fellow jurors.[31] The sole question in Amirault was whether the defendant had proved, by a preponderance of the evidence, that the suspect juror was biased. Laguer presented a claim of juror bias that was allegedly proclaimed to all the deliberating jurors. The Laguer facts prompt two inherent questions: first, whether the suspect juror was biased and second, whether the remaining jurors were exposed to racial bias. In Laguer the words allegedly spoken were so blatant that proof that they were truly uttered would prove the suspect juror was biased and thus end the inquiry.

Some may say that the case at hand presents a set of facts where the suspect juror may not be biased, consciously or subconsciously, and yet the remaining jurors may have been exposed to racial bias through the words of the suspect juror and the argument those words provoked. If Mr. McCowen proves by a preponderance of the evidence that the suspect juror was not impartial, then he is entitled to a new trial for a trial infected by a biased juror does not pass constitutional muster. If Mr. McCowen fails to carry that burden but does prove by a preponderance of the

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[31]As the trial judge ruled, the juror had no present memory of the forty plus year old event.

evidence that the remaining jurors were exposed to racial bias, is he automatically entitled to a new trial?

The facts at hand are not as blatant as those in Laguer. Some may say that this is a case invoking subconscious racism on the part of the remaining jurors. The Laguer rule leads to a new trial in instances of blatant racism. A broad look at the case law suggests that if Mr. McCowen proves, by a preponderance of the evidence, that the remaining jurors were exposed to racial bias then the burden should shift to the Commonwealth to prove beyond a reasonable doubt that the exposure did not prejudice the defendant. See State v. Watkins, 526 N.W. 2d 638, 641-642 (Minn. Ct. App.1995); State v. Jackson, 912 P.2d 71, 80 (Hawaii, 1996).

Reaching the Ultimate Facts

The resolution of a motion for a new trial involving allegations of juror racial bias is inherently a fact-based inquiry. Laguer, 36 Mass. App. Ct. at 314. "The determination of this issue is a question of fact and rests with the trial judge." Amirault, 399 Mass. at 626. The short answer to two of the three claims of racial bias in the present case is that there is no factual basis to support the allegations. Juror Cahill did not tie her fear of the defendant to race.[32] A juror's expression of fear of a defendant, absent racial or ethnic origins, does not necessitate a new trial. U.S. v. Owens, 426 F3d 800, 804-805 (6th Cir. 2005); also see Commonwealth v. Angiulo, 415 Mass. 502, 528-529 (1993) (wherein a juror complained that the defendant was "giving them the evil eye", but the issue was not directly addressed). Juror Gomes did not express racial animus

[32]Juror Cahill stated the defendant was staring at the jury. Indeed the defendant did stare at the jury at times during the proceedings but he also stared at witnesses, counsel, the court and the codfish that hangs from the ceiling of the courtroom. This jurist never inferred that the defendant was attempting to intimidate the jurors, but someone not accustomed to the rigors of a long trial could have concluded otherwise.

towards blacks . The court has found that the man does not harbor racial prejudice. The claim of interference by the alternate juror also proved to be meritless. The determinative factor is not whether the deliberating jurors spoke to the alternate juror during breaks but whether the alternate juror expressed his thoughts and thereby affected the verdict. Commonwealth v. Casey (No. 1), 442 Mass. 1, 4-5 (2004).

There remains the ultimate determination as to Juror George's reference to Mr. McCowen as "a", or "this", big black man. Calling someone of African American heritage "black" is not, in the abstract, evidence of racial prejudice on the part of a juror. Washington v. Hall, 697 P.2d 597, 602 (Wash. Ct. App., 1985). A juror's use of the term "black bastard", in reference to the defendant in a conversation outside the courthouse, is not presumptive evidence of racial bias. Wright v. U.S., 559 F. Supp. 1139, 1152 (E.D.N.Y., 1983). A juror's calling the defendant a "darky", or worse, does call into play racial bias. Watkins, 526 N.W. 2d at 641-642; Henley, 238 F.3d, at 1121. Referring to a female of African American heritage as "Sapphire" is an example of the use of a patently racist term. Tavares, 385 Mass. at 153. Yet the presence or absence of these words is not determinative of the issue. Even "Sapphire", used in a jocular fashion, did not lead to a new trial in Tavares. In considering juror bias it has been said that: "There is no comprehensive set of grounds which have been held sufficient to overturn a verdict; each case necessarily depends on its own facts." Tobias, 468 F. Supp. at 1290.

The Tavares court rejected a rule that the use of a racist term requires a new trial per se, in favor of examining the language used in context. Tavares, 355 Mass. at 155. A post verdict inquiry of jurors gives the court "an opportunity to clarify the context in which the alleged statements were made". Tobias, 468 F. Supp. at 1291. "The overarching principle in defining

the scope of the inquiry is that the breadth of the questioning should be sufficient to permit the entire picture to be explored." New Jersey v. Phillips, 731 A 2d at 108. In determining the ultimate facts in the case at hand this court must look to the language used, the context in which it was used and any other pertinent facts.

The post verdict questioning of jurors requires the fact finder to determine issues of credibility, "including findings about the credibility of an accusing juror and the credibility of other witnesses". Laguer, 36 Mass. App. Ct. at 314. Also see Amirault, 399 Mass. at 626. Demeanor of the witness assists in determining the witness' credibility and intent. Tavares v. Holbrook, 779 F.2d 1, 3 (1st Cir. 1985). "A person's manner may negate a barb his oral utterances seem to hold, just as it may supply a sting that might otherwise not be apparent." New Jersey v. Phillips, 731 A. 2d at 107. "Tension between jurors favoring guilt and those favoring acquittal is part and parcel of the internal decision-making process of jury deliberations"; Mahoney, 406 Mass. at 855, and may be considered in matters of credibility and context. A juror's uncorroborated post trial testimony may be cause for caution. See Delp, 41 Mass. App. Ct. at 439. Affidavits by jurors may be used in the discretion of the finder of fact to determine credibility. See Jacobson, 19 Mass. App. Ct. at 684 fn. 21.

Reliance on the testimony of an accused juror has given rise to some debate. "Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." So said Justice Sandra Day O'Connor in her concurring opinion in Smith v. Phillips. Smith v. Phillips, 455 U.S. at 221-222. The Laguer court embraced and enlarged upon Justice O'Connor's words by saying: "We think that the 'difficulty' translates into an

'impossibility' when the bias in question is ethnic or racial in nature and the inquiry occurs years after the event". Laguer, 410 Mass. at 99. Justice Brennan, in a concurring opinion in a 1984 case, adopted Justice O'Connor's words in the following quote: "Because the bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it,' it necessarily must be inferred from surrounding facts and circumstances." McDonough Power Equipment v. Sevenwood, 464 U.S. 548, 558 (1984) (Brennan, J., concurring). Laguer and McDonough Power aside, our case law permits a trial judge to rely on the testimony of an accused juror otherwise found to be credible. Grant, 391 Mass. at 653; Guisti, 449 Mass. at 1019. "A juror's testimony is not 'inherently suspect' and a judge may rely on it in determining the existence of bias." Amirault, 399 Mass. at 626. This jurist has accepted parts of the accused jurors' testimony but only after running it through the filtering comments of Justice O'Connor.

Professor Samuel Sommers' testimony has informed the court's efforts to understand the import of Juror George's words. That is not to say that his testimony has been accepted carte blanche. Professor Sommers is a social scientist who works in a field where it is difficult to construct relevant experiments and to extract meaningful data. For example, the professor's experiments with individual mock jurors arguably prove that white jurors are better able to set aside racial bias in racially charged criminal cases (MTR 3-63 to 64), but analyses done across wide numbers of jurors in capital cases in the real world refute that conclusion (MTR 3-68). The court has embraced part of Professor Sommers' testimony and rejected other portions. For example, the professor's discussion of race as a descriptive adjective is important but the court gives limited credence to the professor's assumption that the mention of race is suspect in

situations where the conversation is not ambiguous as to race (MTR 3-39 to 41). While the professor assumes, based on academic research, that people are thrifty in their use of adjectives, this jurist's life experience is otherwise. Reality is that there is a wide range in the use of adjectives from person to person. Much of what Professor Sommers said is informative but not determinative of the outcome on the motion at hand because, as Professor Sommers testified, "When things play out in the real world, in a courtroom, all bets are off; and it becomes important to look at the specifics of that case" (MTR 3-50 to 51).

The mere fact that Juror George brands her use of the term black as descriptive does not carry the day for the Commonwealth. The understanding of Jurors Bohanna, Audet and others that the term black man referred to Mr. McCowen directly is more significant. The credible evidence is that Juror George was referring to Mr. McCowen, not to black men as a class or group. This weakens the suggestion of overt prejudice on the part of Juror George. What remains is to determine if the statement reflects veiled or subconscious bias or stereotyping.[33]

The words were spoken when Juror George was at the easel marshaling the facts as she viewed them. The issue before the group was how Ms. Worthington sustained her injuries. The jurors had heard in closing arguments from Attorney George that men, other than Mr. McCowen, may have caused the injuries. The jurors had met two of these men during the trial, Timothy Arnold and Jeremy Frazier, both white and less powerfully built than Mr. McCowen. The third

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[33]"The issue of racial or ethnic bias in the courts 'is not simply a matter of political correctness to be brushed aside by a thick skinned judiciary.' Powell v. Allstate Ins. Co., 652 So.2d 354, 358 (Fla. 1995). It is an issue that must be confronted whenever improperly raised in judicial proceedings. Even statements made without a biased intent may have a negative effect when it comes to issues of race. The failure to inquire as to the impact of such statements in a criminal trial allows the prejudice, if any, to go forward." Varner, 643 NW2d at 305.

man was only identified as the white, middle-aged man who drove a dark colored truck seen exiting the driveway of the Worthington residence the day before the discovery of the crime. (TTR 3525-3526). In his statement to the police, Mr. McCowen said he and Mr. Frazier were at the house and that Mr. Frazier inflicted the injuries (TTR 1782-1784). Set in this context, the words "big black man" are descriptive, identifying who inflicted the injuries and the size of the assailant.

The efficacy of an immediate retort to an inappropriate comment during jury deliberations is well recognized in the case law. Fidler, 377 Mass. at 201 fn 8; Jackson, 912 P.2d at 81. Juror Bohanna responded with vigor to Juror George's statement, labeling her a racist. Juror George shot back a denial and added "that's not what I was meaning and you know that." The two vented their tensions, not surprising given the length of deliberations in this case. A break was called, Jurors Bohanna and George spoke cordially during the break, and deliberations resumed for three more days. Juror Bohanna was a vigilant juror on all matters, race included. Her conduct in the moments and hours after the confrontation helps to flesh out the context of the spoken words. The words spoken by Juror George, Juror Bohanna's vigilance, and the tension inherent in protracted deliberations, led to an immediate retort. Juror Bohanna's conduct thereafter speaks to a reflective acceptance of the descriptive nature of the words and productive deliberations leading to a verdict. Her conduct corroborates Juror George's denial of racial bias announced in the jury room on November 13, 2006 and reaffirmed by Juror George's testimony of January 10, 2008. Juror George answered the court's questions on voir dire during impanelment truthfully.

The court finds that Juror George's statement was descriptive in nature and intent and did

not constitute racial bias on her part. The defendant has failed to prove, by a preponderance of the evidence, that Juror George was not impartial. Despite the speaker's innocent intention, the image of a big black man beating on a small woman dovetails into a common racial stereotype that black men are prone to violence (MTR 3-29). The court must consider whether the remaining jurors perceived such a stereotype from the words spoken. See Varner, 643 N.W. 2d at 304; Holbrook, 779 F. 2d at 2-3.

Racial stereotypes, while regrettable and harmful, are ingrained in our society (MTR 3-29). Even with well intended individuals, the interjection of a racial stereotype can influence individual and collective judgments (MTR 3 - 29). Nonetheless, well intentioned people have the ability to rise above such stereotypes (MTR 3 - 30, 52, 65), particularly in a setting where preventative measures are taken. Every juror in this case passed muster during impanelment on questions concerning racial bias. Such an initial voir dire has a remedial effect. See Watkins, 526 N.W. 2d at 642. Their oath was a preventative measure. The court's charge directed them to remove bias from their deliberations (TTR 3595). The offending statement was uttered once during eight days of deliberations. See Jackson, 912 P. 2d at 81. Juror Bohanna responded vigorously and appropriately to the offending statement. During deliberations fellow jurors reminded the group to stick to the evidence and to be on guard for racial bias. Id. The interjection of the offending statement did not lead to a prompt verdict but was instead followed by three more days of deliberations.[34]

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[34]Research suggests that an offending statement made to jurors open to racial stereotyping shortens deliberations (MTR 3-32). "The length of the jury deliberation may be significant. An extended deliberation may indicate the closeness of the issues or the gravity of the debate. It may indicate full and careful consideration. Excessive speed in reaching a verdict is sometimes seized upon to evidence bias or prejudice. Haste may indicate inattention to duty, carelessness or

'[I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote". Smith v. Phillips, 455 U.S. at 217. The defendant has failed to prove, by a preponderance of the evidence, that the jurors were exposed to racial bias from the statements of Jurors George and Bohanna. The racial stereotype we are now concerned with was inherent in the facts of the case. The statements of Jurors George and Bohanna served the salutary purpose of exposing the jurors to a healthy, albeit heated, discussion about identifying the defendant by the color of his skin, thereby blunting the effect of the stereotype. Even if Mr. McCowen had met his burden, the Commonwealth proved on the totality of the evidence the absence of prejudice to the defendant beyond a reasonable doubt. It bears repeating that the oft-expressed second thoughts of a conscientious juror do not necessitate a new trial. Delp, 41 Mass. App. Ct. at 440.

The court has not looked to the strength of the Commonwealth's case in reaching this decision.[35] While that may be appropriate in a case of an external influence on a jury, Fidler, 377 Mass. at 201 fn. 8; Kincaid, 444 Mass. at 389, the defendant's right to an impartial jury is so fundamental that any consideration of the strength of the case as a substitute or backstop to concerns about racial bias would be unacceptable. See U.S. v. Heller, 785 F.2d 1524, 1528-1529 (11th Cir. 1986) (wherein the time and expense of a retrial was deemed to be an

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bias." Pope, Jury Misconduct and Harm, 12 Baylor L. Rev. 355, 374 (1960).

[35]Both Jurors Bohanna and Audet's affidavits report that this jurist, upon meeting with the jurors after the verdict, told them they "had made the right decision". This quote should not be misconstrued to say that this jurist has expressed his view about the strengths or shortcomings of the Commonwealth's case for the quote is incomplete. When the court met with the jurors and was asked if they had made the right decision this jurist replied, as is my answer whenever jurors ask such a question, that if they had fully and fairly discussed their evidence and they came to a unanimous decision then they had made the right decision.

unacceptable consideration in evaluating an instance of ethnic prejudice). This court is not persuaded on this point by the few cases to the contrary. See Watkins, 526 N.W. 2d at 642; Jackson, 912 P. 2d at 81.

One final observation is in order. For over thirty years this author has witnessed the delivery of verdicts in serious criminal cases. Watching jurors being polled has shown, in many instances, a trembling hand, a tear trickling down, or the word "Guilty" getting caught in a juror's throat. The polling of the jury in this case was extraordinary. After eight days of deliberations not one juror trembled, or shed a tear or choked on his or her words. Unfettered unanimity was obvious from the conduct of the jurors as well as from the words they spoke as they were individually polled.

ORDER

For the above-stated reasons it is **ORDERED** that the defendant's motion for a new trial, entitled Motion For Post Verdict Inquiry of Jurors Pursuant to Commonwealth v. Fidler, be **DENIED**.

Gary A. Nickerson
Justice of the Superior Court

DATED: April 4, 2008